

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent-Plaintiff,

v.

JAMES TERRY HENRIKSON,

Petitioner-Defendant.

NO: 2:14-CR-0124-TOR-1

ORDER ON DEFENDANT'S  
MOTION UNDER 28 U.S.C. § 2255

BEFORE THE COURT is Petitioner-Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. ECF No. 1043. Petitioner-Defendant is proceeding *pro se*. The United States filed its Response. ECF No. 1050. Petitioner-Defendant filed a Reply. ECF No. 1054. The Court has reviewed the record and files herein, the completed briefing, and is fully informed.

**BACKGROUND**

On September 16, 2014, Defendant, along with others, was indicted for 11-crimes: Murder-for-Hire, counts 1 and 2; Conspiracy to Commit Murder-for-Hire, counts 3, 4, 5, and 6; Solicitation to Commit Murder-for-Hire, counts 7, 8, 9, and

1 10; and Conspiracy to Distribute Heroin, count 11. ECF No. 17. On February 25,  
2 2016, a jury found Defendant guilty of all 11 counts in the Indictment. ECF No.  
3 761.

4 On May 24, 2016, Defendant was sentenced to “A term of life with respect  
5 to Count 1, a term of life with respect to each of Counts 2 and 3, concurrent with  
6 each other, but consecutive with Count 1; 10 years with respect to each of Counts  
7 4, 5, and 6 to run concurrently with each other, but consecutive to Count 1, and  
8 Counts 2 and 3; 20 years with respect to Count 7, to run concurrently with Count 1;  
9 20 years with respect to Count 8, to run concurrently with Counts 2 and 3; 5 years  
10 on each of Counts 9 and 10, to run concurrently with Counts 4, 5, and 6; and 10  
11 years on Count 11, to run consecutively with Counts 1, 2, 3, 4, 5, and 6. ECF No.  
12 863.

13 The parties are familiar with the lengthy facts of this case and the Court will  
14 not recite them here. On April 18, 2023, Defendant filed the instant motion  
15 seeking an evidentiary hearing, vacation of counts 7 through 10, and a *de novo*  
16 resentencing hearing. ECF No. 1043.

### 17 **DISCUSSION**

18 The Court finds that the issues raised do not require an evidentiary hearing.  
19 *See* Rule 8, Rules—Section 2255 Proceedings. The transcripts, records and  
20 materials filed in this proceeding adequately document the issues for resolution.

1       **A. Motion to Vacate, Set Aside or Correct Sentence**

2           Title 28 U.S.C. § 2255 provides four grounds under which a federal court  
3 may grant relief to a federal prisoner who challenges a sentence of incarceration:  
4 (1) “that the sentence was imposed in violation of the Constitution of laws of the  
5 United States;” (2) “that the court was without jurisdiction to impose such  
6 sentence;” (3) “that the sentence was in excess of the maximum authorized by  
7 law;” and (4) that the sentence “is otherwise subject to collateral attack[.]” 28  
8 U.S.C. § 2255(a). The Supreme Court has repeatedly interpreted this to encompass  
9 only errors that constitute a “fundamental defect which inherently results in a  
10 complete miscarriage of justice” or “an omission inconsistent with the rudimentary  
11 demands of fair procedure.” *United States v. Timmreck*, 441 U.S. 780, 783 (1979)  
12 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). While the remedy is in  
13 this sense comprehensive, it does not encompass all claimed errors in conviction  
14 and sentencing. *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Generally,  
15 motions pursuant to § 2255 must be filed within one year from “the date on which  
16 the judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1). However, the  
17 statute also authorizes filing within one year of “the date on which the facts  
18 supporting the claim or claims presented could have been discovered through the  
19 exercise of due diligence.” *Id.* § 2255(f)(4).

20

1 Defendant contends that he is actually innocent of Counts 7 through 10  
2 based on new case law and therefore his petition is timely. The Government  
3 agrees that to the extent he may be “actually innocent” of Counts 9 and 10, it does  
4 not invoke either the statute of limitations or a procedural default defense. ECF  
5 No. 1050 at 11, n.9.

6 **B. Solicitation of a Crime of Violence (Counts 9 and 10)**

7 In *United States v. Linehan*, 56 F.4th 693 (9th Cir. 2022), the Ninth Circuit  
8 ruled that soliciting the commission of a crime of violence in violation of 18  
9 U.S.C. § 373, specifically a violation of 18 U.S.C. § 1958 (murder for hire), is not  
10 a crime of violence. In *Linehan* and in *Gregorczyk v. United States*, 142 S. Ct.  
11 2580 (2022), the Government conceded that pure solicitation is not a crime of  
12 violence.

13 Here, the Government concedes that Counts 9 and 10 were mere  
14 solicitations that did not result in death or injury to the victims. Accordingly, the  
15 Government agrees that *Linehan* controls and Defendant is innocent of Counts 9  
16 and 10 as charged.

17 **C. Solicitation of a Crime of Violence Resulting in Death (Counts 7 and 8)**

18 In *Linehan*, the Ninth Circuit expressly left the question open as to whether  
19 the aggravated offenses of § 1958(a)—which impose longer terms of imprisonment  
20

1 if personal injury or death results—should be treated differently, citing *United*  
2 *States v. Runyon*, 994 F.3d 192, 201-03 (4th Cir. 2021).

3 In *Runyon* the issue was whether conspiracy to commit murder for hire in  
4 violation of 18 U.S.C. § 1958(a) was a crime of violence. The *Runyon* Court  
5 explained:

6 Whether conspiracy to commit murder for hire in violation of  
7 § 1958(a) is a crime of violence merits a fuller discussion. This  
8 inquiry requires us to consider the elements of the offense and  
9 whether a conviction under those elements necessarily requires the  
10 “use” of physical force within the meaning of the force clause.

9 Section 1958(a) provides that:

10 Whoever travels in or causes another (including the intended  
11 victim) to travel in interstate or foreign commerce, or uses or  
12 causes another (including the intended victim) to use the mail or  
any facility of interstate or foreign commerce,

13 with intent that a murder be committed in violation of the laws of  
any State or the United States as consideration for the receipt of,  
14 or as consideration for a promise or agreement to pay, anything of  
pecuniary value,

15 or who conspires to do so,

16 shall be fined under this title or imprisoned for not more than ten  
17 years, or both;

18 and if personal injury results, shall be fined under this title or  
imprisoned for not more than twenty years, or both;

19 and if death results, shall be punished by death or life  
20 imprisonment, or shall be fined not more than \$250,000, or both.

1 18 U.S.C. § 1958(a) (emphasis added) (spaces between clauses  
2 added).

3 Because § 1958(a) imposes distinct enhanced penalties in  
4 circumstances where “personal injury results” or where “death  
5 results,” those are alternative elements for conviction that must be  
6 proven to the jury beyond a reasonable doubt under *Apprendi v. New*  
7 *Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *See*  
8 *Mathis*, 136 S. Ct. at 2256 (“If statutory alternatives carry different  
9 punishments, then under *Apprendi* they must be elements”); *see also*  
10 *Burrage v. United States*, 571 U.S. 204, 210, 134 S.Ct. 881, 187  
11 L.Ed.2d 715 (2014) (“Because the ‘death results’ enhancement  
12 increased the minimum and maximum sentences to which [the  
13 defendant] was exposed, it is an element that must be submitted to the  
14 jury and found beyond a reasonable doubt”).

15 *Runyon*, 994 F.3d at 201-02.

16 While conspiracy alone does not necessarily implicate the use of  
17 force, conspiracy in the context of the § 1958 offense at issue is  
18 different because it has heightened *mens rea* elements, as well as the  
19 element that “death results.” As already noted, an act that results in  
20 death obviously requires “physical force.”

21 *Runyon*, 994 F.3d at 203 (citations omitted).

22 Here, a review of the Indictment (ECF No. 17), the jury instructions (ECF  
23 No. 755 at Instr. 34 and 38), and the jury’s verdict (ECF No. 761 at 4-5), all show  
24 that both victims were murdered as charged and proved in Counts 7 and 8. Thus,  
25 an element of the offense charged involved a crime of violence and the  
26 Government proved that element.

27 Accordingly, Defendant has not established a constitutional violation or  
28 other right to relief with respect to Counts 7 and 8.

1       **D. Remedy**

2       Defendant seeks a *de novo* resentencing hearing. ECF No. 1043. Defendant  
3 received sentences of 5 years on each of Counts 9 and 10, to run concurrently with  
4 Counts 4, 5, and 6. The 10-year sentences for Counts 4, 5, and 6 were imposed  
5 concurrently to each other and consecutively to the life sentence imposed in Count  
6 1 and the consecutive life sentence imposed in Counts 2 and 3.

7       Thus, even though Defendant received a sentence of 5-years in prison for  
8 Counts 9 and 10, they are running concurrently with Counts 4, 5, and 6, which do  
9 not even begin to run until Defendant serves his two consecutive life terms on  
10 Counts 1, 2, and 3.

11       As a general rule, “§ 2255 provides the exclusive procedural mechanism by  
12 which a federal prisoner may test the legality of detention.” *Loretsen v. Hood*,  
13 223 F.3d 950, 953 (9th Cir. 2000). Section 2255 allows a federal prisoner claiming  
14 that his sentence was imposed “in violation of the Constitution or laws of the  
15 United States” to “move the court which imposed the sentence to vacate, set aside  
16 or correct the sentence.” 28 U.S.C. § 2255.

17       Defendant contests the use of the “concurrent sentence doctrine” to his case.  
18 He contends that *United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984)  
19 rejected the doctrine for all future cases. However, *De Bright* was a direct appeal  
20 case, not a § 2255 collateral attack. The Supreme Court has also rejected the

1 concurrent sentence doctrine in a direct appeal case. *Ray v. United States*, 481  
2 U.S. 736 (1987). Thus, the concurrent sentence doctrine is discretionary when  
3 applied to a § 2255 collateral attack. *See also Amaya v. United States*, 71 F.4th  
4 487 (6th Cir. 2023)

5 Whether or not the concurrent sentence doctrine would otherwise apply to  
6 this case, Defendant will not be released by the vacation of the convictions  
7 concerning Counts 9 and 10. Accordingly, the Court will enter an Amended  
8 Judgment.

#### 9 **E. Certificate of Appealability**

10 A petitioner seeking post-conviction relief may appeal a district court's  
11 dismissal of the court's final order in a proceeding under 28 U.S.C. § 2255 only  
12 after obtaining a certificate of appealability ("COA") from a district or circuit  
13 judge. 28 U.S.C. § 2253(c)(1)(B). A COA may issue only where the applicant has  
14 made "a substantial showing of the denial of a constitutional right." *See id.*  
15 § 2253(c)(2). To satisfy this standard, the applicant must "show that reasonable  
16 jurists could debate whether (or, for that matter, agree that) the petition should  
17 have been resolved in a different manner or that the issues presented were adequate  
18 to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S.  
19 322, 336 (2003) (internal quotation marks and citation omitted).

1 The Court concludes that Defendant is not entitled to a COA because he has  
2 not demonstrated that jurists of reason could disagree with this Court's resolution  
3 or conclude the issues presented deserve encouragement to proceed further.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Petitioner-Defendant's Motion to Vacate, Set Aside, or Correct Sentence  
6 under 28 U.S.C. § 2255 (ECF No. 1043) is **GRANTED in part and**  
7 **DENIED in part.**

8 2. Defendant's convictions on Counts 9 and 10 are **VACATED**. The Court  
9 will enter an Amended Judgment reflecting such.

10 3. Defendant's challenge to Counts 7 and 8 are untimely and substantively  
11 **DENIED**.

12 4. The Court further certifies that there is no basis upon which to issue a  
13 certificate of appealability and the same is **DENIED**. 28 U.S.C. § 2253(c);  
14 Fed. R. App. P. 22(b).

15 The District Court Executive is hereby directed to enter this Order and the  
16 Amended Judgment and furnish copies to the parties. This file and the  
17 corresponding civil file (2:23-CV-0104-TOR) shall be **CLOSED**.

18 DATED August 16, 2023.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge